Filed 3/8/11 P. v. Malone CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LESTER ANTUAN MALONE, Defendant and Appellant.	B225498 (Los Angeles County Super. Ct. No. MA039664)

APPEAL from an order of the Superior Court of Los Angeles County. Thomas R. White, Judge. Reversed for resentencing.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Corey J. Robins, Deputy Attorneys General for Plaintiff and Respondent.

* * * * * * * * * *

The sole issue presented on appeal is whether there is sufficient evidence defendant and appellant Lester Antuan Malone suffered a qualifying prior felony conviction within the meaning of California's "Three Strikes" law. (Pen. Code, §§ 667, subd. (b), 1170.12.) Defendant entered into a negotiated disposition with respondent regarding theft and related charges pending in three different criminal matters. The terms of the parties' plea agreement provided that if respondent proved that a prior federal conviction defendant suffered in 1996 qualified as a strike under California law, defendant's sentence would be 11 years. If the prior conviction did not qualify as a strike, then the agreed-upon sentence would be seven years. We conclude there is insufficient evidence of a qualifying strike and therefore reverse for resentencing consistent with this opinion and applicable law.

FACTS AND PROCEDURAL BACKGROUND

In 2007, defendant pled no contest to a charge of theft (Pen. Code, § 484e, subd. (d)) and related allegations. Pursuant to a plea agreement with respondent that collectively resolved three pending criminal complaints, defendant agreed to an 11-year sentence if respondent was able to prove that his prior conviction in 1996 for aiding and abetting a federal bank robbery qualified as a strike under California law. The parties further agreed that defendant's sentence would be the lesser term of seven years, in the event respondent was unable to prove the federal bank robbery conviction qualified as a serious felony pursuant to section 1192.7. At the time the plea was taken, respondent did not have the supporting documentation regarding the prior conviction which had occurred in federal court.[1] It was agreed that sentencing would be postponed pending receipt of a new probation report and respondent's evidence regarding the prior. At the sentencing hearing held in October 2007, the trial court sentenced defendant to the 11-year term

---

[1] The record reflects respondent originally believed the prior had occurred in the State of Arizona, but it was subsequently determined the conviction arose from proceedings in federal court for the Central District of California, case No. CR-95-1130(B)-TJH.

without having received any evidentiary materials from respondent supporting the strike allegation.

Defendant filed a writ of habeas corpus (B218910) challenging the imposition of the 11-year term, and this court ordered respondent to file a preliminary response indicating whether respondent had submitted the requisite documentation in support of the strike allegation per the parties' agreement. Respondent filed a response acknowledging that no documentation had been presented to the trial court. This court then issued an order to show cause returnable to the superior court, the parties filed briefing, and an evidentiary hearing was held in the trial court on May 7, 2010. After considering the briefs and evidence submitted by the parties, the trial court reimposed the 11-year prison sentence, finding defendant's conviction in federal court for aiding and abetting a bank robbery, pursuant to title 18 United States Code section 2113(a), qualified as a serious felony under California law. All other terms of the original sentence were ordered to remain in full force and effect.

Defendant, through appointed counsel, filed another writ of habeas corpus (B227338) concurrently with this direct appeal, both of which are limited to challenging the court's sentencing order of May 7, 2010. In the direct appeal, defendant filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, reserving all of his argument for his brief in support of the writ. Upon initial review of the parties' submissions, we concluded the court's sentencing order of May 7, 2010, which included consideration of new evidence, was directly appealable. (Pen. Code, § 1237.) Accordingly, by order dated December 1, 2010, we indicated our intent to dispose of defendant's contentions by way of the direct appeal, to strike defendant's *Wende* brief, to treat the writ briefing as the briefing on the appeal, and to consolidate all further proceedings under B225498. We gave the parties an opportunity to file objections to this procedure and to file supplemental briefing if necessary, but neither party filed any further papers. We therefore proceed with resolution of defendant's contentions under consolidated case No. B225498.

DISCUSSION

We must determine whether the record contains sufficient evidence that defendant's 1996 federal conviction for aiding and abetting a bank robbery pursuant to title 18 United States Code section 2113(a) qualifies as a serious felony for purposes of California's Three Strikes law. (Pen. Code, §§ 667, subd. (b), 1170.12.) "On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found . . . the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Miles* (2008) 43 Cal.4th 1074, 1083 (*Miles*).) With these principles in mind, we conclude the record does not contain sufficient evidence in support of the strike allegation and therefore reverse for resentencing.

The record reflects defendant was convicted in 1996, pursuant to a plea agreement, of a violation of paragraph (a) of title 18 United States Code section 2113, entitled "Bank robbery and incidental crimes." Paragraph (a) of the federal statute sets forth *two disjunctive offenses*: "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; *or* [¶] Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny-- [¶] Shall be fined

under this title or imprisoned not more than twenty years, or both." (§ 2113(a), italics added.)[2]

Under California law, Penal Code section 1192.7, subdivision (c) expressly enumerates "robbery or bank robbery" as a criminal offense which qualifies as a "serious felony" for purposes of sentence enhancements. Subdivision (d) of the California statute defines "bank robbery" to mean the taking or attempted taking "*by force or violence, or by intimidation* from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association." (§ 1192.7, subd. (d), italics added.)

To qualify as a strike under California law, a "bank robbery" must be an offense undertaken by force, violence or intimidation; the entry into a bank with the intent to commit a felony or larceny, akin to the federal statute's second prong, is insufficient. "The California serious felony of bank robbery substantially coincides with the offense described in the *first* paragraph of [title 18 United States Code] section 2113(a) . . . . However, there is no California serious felony that corresponds to the crime described in the *second* paragraph of section 2113(a). Thus, evidence that the defendant suffered a previous conviction under section 2113(a), standing alone, cannot establish that the conviction was for a serious felony under California law." (*Miles*, *supra*, 43 Cal.4th at pp. 1081-1082, fns. omitted.)

Respondent had the burden of establishing the prior serious felony sentencing allegation beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) Where the fact of conviction pursuant to a specific statute is inadequate to prove qualification as a serious felony, the court may look to the record of conviction in the prior proceeding. (*Miles*, *supra*, 43 Cal.4th at p. 1082.) Respondent offered certified records from the United States Department of Justice, Federal Bureau of Prisons,

---

[2] The remaining paragraphs of title 18 United States Code section 2113 set forth additional nonqualifying offenses and definitions not pertinent to our discussion.

including the judgment and probation/commitment order from the 1996 federal case, No. CR-95-1130(B)-TJH. These records constitute an admissible form of evidence to prove a strike allegation. (Pen. Code, § 969b; *Miles*, at p. 1087; see also *People v. Prieto* (2003) 30 Cal.4th 226, 258 [" 'prior convictions are normally proven by the use of documentary evidence alone' [Citation.]"].)

However, the federal court judgment form, while admissible, does not include additional facts concerning the nature of defendant's 1996 conviction. The judgment form states only that defendant, pursuant to a guilty plea, was convicted of the offense of "Bank Robbery, Aiding and Abetting, in violation of Title 18, United States Code, Sections 2113(a), and 2(a); as charged in Count Eight of the Second Superseding Indictment."[3] The form also indicates defendant received a two-year sentence out of a possible 20-year commitment, with three years supervised release. Assuming the fingerprint card which was part of the certified record was admissible,[4] it fails to provide any additional facts. No other material evidence was proffered to the trial court, including no copy of the operative indictment setting forth the facts surrounding defendant's 1996 offense.[5]

The record therefore leaves in doubt which prong of paragraph (a) of title 18 United States Code section 2113 underlies defendant's federal bank robbery conviction. If the alleged qualifying prior was for an offense that can be committed in multiple ways,

---

[3] Title 18 United States Code section 2(a) is the federal statute defining "principals" to crimes, inclusive of aiders and abettors. The citation to this second statute therefore shines no light on the factual circumstances of defendant's offense.

[4] There is no record defendant raised any objection to the receipt of the fingerprint card or any portion of the certified records.

[5] Respondent attached additional documents to its brief on appeal, with no indication the records were duly presented to the trial court for consideration. Even assuming they were considered, they too fail to "connect the dots", namely that count eight of the operative indictment (the sole count that formed the basis of defendant's conviction) included facts showing defendant aided and abetted in a bank robbery involving the use of a gun.

as here, "and the record of the conviction does not disclose how the offense was committed, *a court must presume the conviction was for the least serious form of the offense*." (*Miles*, *supra*, 43 Cal.4th at p. 1083, italics added; accord, *People v. Delgado* (2008) 43 Cal.4th 1059, 1066.) Unlike *Miles*, where the record included additional facts showing that the defendant had engaged in aggravated conduct during the bank robbery, including being "armed" and "kidnapping" (*Miles*, *supra*, at p. 1091), there are no additional facts here to bolster the plain reference to "bank robbery" in the conviction form. The bare reference to "bank robbery" in the judgment form is insufficient to prove beyond a reasonable doubt that the conviction was for the greater offense set forth in the first prong of paragraph (a) of section 2113. (*People v. Jones* (1999) 75 Cal.App.4th 616 (*Jones*) [judgment of conviction citing the federal statute and a fingerprint card identifying charge as "bank robbery" insufficient to establish first prong of federal bank robbery statute was violated].)

We therefore reverse for resentencing. (*People v. Monge* (1997) 16 Cal.4th 826, 829 [retrial on prior conviction allegation not precluded by double jeopardy]; *Jones*, *supra*, 75 Cal.App.4th at p. 635.) In any new sentencing proceedings conducted by the trial court, if respondent seeks imposition of the agreed-upon 11-year term, then respondent must present additional admissible evidence establishing the facts surrounding defendant's 1996 bank robbery conviction. We express no opinion as to what documentary evidence from the record respondent must provide in order to satisfactorily establish that the 1996 conviction qualifies as a prior serious felony. We leave that determination to the trial court. If respondent does not present sufficient additional evidence establishing a violation of the first prong of paragraph (a) of title 18 United States Code section 2113, or chooses not to proceed with a retrial of the sentencing allegation, then the court shall sentence defendant to the agreed-upon lesser term of seven years.

DISPOSITION

The trial court's sentencing order of May 7, 2010, is reversed. The action is remanded for the limited purpose of resentencing consistent with applicable law and the

parties' negotiated plea agreement. In the event respondent chooses not to retry the prior strike allegation, the trial court shall resentence defendant to the agreed-upon seven-year term. Following completion of resentencing proceedings, the trial court is directed to prepare and transmit a certified copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.